

Brexit - A Legal Analysis: Future UK-EU Trade Relations

Kenneth Armstrong

Professor of European law and Director of the Centre for European
Legal Studies, University of Cambridge

Scope

- Focus on what Brexit might mean in terms of models of future UK-EU trade and cooperation.
- Does not deal with issues of enforcement of any of the potential models.
- Brexit comes at a particular juncture:
 - Specific 'European' solutions - EEA/Swiss Model/Association Agreements - evidence particular difficulties
 - Multilateral trade liberalisation through WTO has limits.
 - Current emphasis on big and comprehensive EU-bilateral deals (CETA/TTIP).
 - New regional trade blocs.

Outline

- The Mechanism of Withdrawal: Article 50 TFEU and alternatives.
- Withdrawal and associated agreements.
- Procedural rules and veto points.
- Market access:
 - EFTA/EEA - 'Leave Lite'
 - EFTA/Swiss Bilateral agreements with EU
 - EFTA
 - Association Agreement
 - Bilateral trade deal - CETA
 - Customs Union
 - WTO

Mechanisms of Withdrawal

- UK - Article 48 TEU (unanimity + ratification):
 - Radical substantive reconfiguration but UK would still have to be a MS
 - Would not meet expectations of withdrawal and would not be accepted by EU27
- SCO/NI - Article 48 TEU:
 - Territorial limitation by excluding application to parts of UK
 - UK would still formally be a MS
 - But devolveds do not have full competence to undertake UK's obligations.
- Vienna Convention:
 - Application limited to the extent that the treaty of an international organisation makes more specific provision (Article 5 VCLT).
- Article 50 TEU:
 - Introduced by the Lisbon Treaty and only credible mechanism.

The Withdrawal Agreement

- If no agreement then treaty ceases to apply two years from Art 50 being triggered.
- Time limit for negotiation can be extended but only by unanimity. No opposite mechanism to shorten time period.
- One agreement or more?
 - Divorce agreement under Art 50
 - Future trade and cooperation agreement
 - Revision to the primary law of the treaties under Art 48 among EU27.
- Sequencing:
 - No agreement on future relationship until UK becomes 3rd state (but creates legal gap)
 - Parallel Art 50 and trade negotiations

Procedural Rules and Veto Points

- The Article 50 Divorce:
 - Negotiations on behalf of Union - power struggle between Commission and Council.
 - QMV in Council + EP Consent
 - No provision for ratification although UK parliament may demand role before repeal of European Communities Act 1972: potential point of 2nd referendum.
- Future Trade and Cooperation:
 - Depends on the model of future arrangements and choice of legal basis.
 - Drift between legal requirements and political necessities.

Models of Trade and Cooperation

- EFTA Membership + EEA
- EFTA + Free Trade and other bilateral agreements with EU (Swiss model)
- EFTA (including Free Trade Agreements with non-EU states).
- Association Agreement with EU
- Free Trade Agreement (CETA model)
- Customs Union
- WTO rules (default if nothing else and if legal gap between divorce and something else).

The EEA ... 'Leave Lite'

- EEA Agreement between EFTA states (minus Swiss) and EU states.
- UK already a contracting party ...
 - ... But only for matters not within competence of the EU
 - ... Territorial scope of application limited to territory of EU and EFTA3
 - ... And UK on EU side in its relationships with EFTA3 not as regards UK's relationship with EU27 (governed by EU treaties).
- UK would need to join EFTA (unanimous decision of EFTA Council).
- Joining EFTA does not automatically mean in EEA. EEA Council must approve application and agreement subject to ratification by all parties.

Pros and Cons of EEA

- Little substantively to negotiate (prêt-à-porter) so potential for simultaneous Brexit and EEA
- Involvement in expert groups and EU agencies (non-voting)
- Not a Customs Union so UK would be free to conclude trade deals with 3rd countries (and would apply to access EFTA-FTAs)
- Excludes CAP, tax, CFSP, AFCJ
- Includes competition, state aid, procurement, four freedoms and sectoral flanking policies
- Take it or leave it
- EU legislative acts within field of application become annexed to agreement and require to be implemented with limited capacity not to transpose or to seek exemptions.
- Participations costs money including participation in EU research and other programmes.

Going Swiss

- Free trade area of EFTA
- Free trade agreement with EU supplemented by lots of bilateral agreements on technical barriers to trade, aspects of procurement and free movement of persons.
- No comprehensive services agreement (default is GATS supplemented by establishment of providers in EU).
- EU hates this radically a la carte approach and highly unlikely to go down this route given default WTO rules could apply.

Association Agreement

- Vague term but implies extension of significant aspects of EU trade and cooperation to a third country or IO (EEA is in effect an association agreement between EU and another organisation, EFTA).
- Legal basis is Article 217 TFEU and requires unanimity.
- Mixed association agreements also require domestic ratification (potentially also referendum - Dutch negative vote on EU-Ukraine Association Agreement).

CETA ... Feels more like 'Leave'

- Focuses on core aspects of global trade but emphasises bilateral extension above and beyond levels of multilateral GATT and GATS.
- Importantly includes financial services, telecoms and energy.
- New court model for ISDS.
- Could fall within exclusive competence of Common Commercial Policy under Article 207 TFEU (more use of QMV and without domestic ratification).
- But CETA is being adopted as mixed agreement (Malmström statement - 5 July 2016 despite Commission being of view that within exclusive competence of Common Commercial Policy (Opinion 2/15 pending)
- Provisional application pending full entry into force (Article 218(f) TFEU).
- More intensive to negotiate and risk of gap between Brexit and new deal.

Trade Deals Before Brexit

- SoS for Exiting the European Union is making ambitious claims about UK free trade deals including with existing EU states.
- EU Member States do not have competence to enter into such bilateral agreements to extent that they fall within CCP and exclusive EU competence.
- So UK could not do deals with third countries while a Member State and EU states cannot do bilateral deals with UK when UK leaves.
- Two legal problems:
 - What level of opening up talks is possible in absence of Article 50 being triggered?
 - What level of talks is possible once Article 50 is triggered?

Conclusions

- Much of the rhetoric and 'roadmap' of Vote Leave suggested something like a Swiss model. But not preference of EU who would probably just live with WTO rules pending anything else.
- EU and European partners look like they would prefer EEA but with free movement of people in an indivisible Single Market. Unlikely to go down well with Leavers.
- UK's better option might be CETA plus a deal on existing and future migration. But risk of legal gap between Brexit and new trade deal.